



Investigator's Resource Manual

Copyright August 2009
Edition 8.0

Investigator's Resource Manual

DISCLAIMER

The information and guidelines in this manual are intended exclusively for use as a training tool and reference document for state employees with investigative responsibilities. This manual is not intended to create any substantive or procedural duties to any party involved in litigation with the State of Washington. The State of Washington and its employees are permitted in their judgment to act at variance with the information or guidance in this manual in carrying out their legal roles and responsibilities.

Acknowledgements

Reference and source documents used to develop this manual include: Basic Inspector Training Course/Fundamentals of Environmental Compliance Inspections, Office of Enforcement and Compliance Monitoring, United State Environmental Protection Agency, February 1989; The Washington State Department of Ecology Compliance Assurance Manual, November 1997; and, The National Certified Investigator/Inspector Training – Basic Program, from The Council on Licensure, Enforcement and Regulation, 1996.

The Washington State Department of Personnel expresses its sincere gratitude to the Training Subcommittee of the State Investigative Resource Committee, The Washington State Office of the Attorney General/Torts Division, The Council on Licensure, Enforcement and Regulation, and many state employees too numerous to name, for their invaluable assistance in developing and reviewing this manual.

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For information about Investigator Training Core and Advanced course descriptions and dates please visit
<http://www.dop.wa.gov/training/TrainingProgram/InvestigatorTraining/Pages/default.aspx>

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PREFACE

The purpose of this manual and the Investigator Training Program is to implement the State of Washington's EXECUTIVE ORDER 98-02, TRAINING AND PROTOCOLS FOR STATE INVESTIGATORS. As defined in the Order,

"Investigator" means any state employee whose duties include interviewing witnesses, obtaining documents, or otherwise gathering information that may be used in enforcement or disciplinary actions or proceedings where there is a potential for substantial civil or criminal remedies to be imposed on a person or business.

The following state employees are not considered investigators for purposes of implementing Executive Order 98-02:

- a) Commissioned law enforcement officers whose duties consist exclusively of investigating criminal matters;
- b) Employees who conduct checklist inspections or review application materials for eligibility purposes; and
- c) Employees whose investigative duties involve only obtaining documents or data under the supervision of an investigator.

The above definitions and exclusions are recognized as being broad in scope. For that reason, it is the responsibility of all affected state agencies and institutions of higher education to determine who is affected by Executive Order 98-02. To make this determination, state agencies and institutions of higher education should consult with their Assistant Attorney General or call the Investigative Training Coordinator at the Department of Personnel for further assistance.

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Introduction: The Investigator's Resource Manual

In addition to formal classroom training methods, training for many topics in the State of Washington's Investigator Training Program will also be accomplished with this manual. The Investigator's Resource Manual (IRM) is designed as a training tool as well as a reference document for state employees who have investigative responsibilities. This manual is consistent with the teaching objectives and learning outcomes from the Core and Advanced Curricula Investigator Training Outlines. Other curricula topics not covered in the IRM will be addressed in training session. This manual should be used as noted below by:

1. **Employees who are registered for Core and/or Advanced Investigator Training courses** at DOP, or at agencies with DOP approved and certified Core and/or Advanced Investigator Training courses, are responsible for reading and completing this manual before attending the classroom session(s) for which they are registered. The IRM will be provided in advance to employees who are registered for DOP sponsored training sessions. (The IRM is also posted on DOP's Investigator Training Program website at <http://www.dop.wa.gov/training/TrainingProgram/InvestigatorTraining/Pages/default.aspx> or it can be obtained by calling (360) 664-1921.
2. **Employees who intend to petition for an Investigator Training Program – Certificate of Training** based on previous training history must also review and complete the IRM. After reading and completing the IRM, these employees must provide the appointing authority, or the appointing authority's designee, with a signed and dated copy of the ***Affirmation of Completion of the Investigator's Resource Manual*** in conjunction with completing the **Investigator Training Program "Petition for Certification of Previous Investigator Training"**. (This document can be obtained from the Investigator Training Program website at <http://www.dop.wa.gov/training/TrainingProgram/InvestigatorTraining/Pages/default.aspx> or by calling (360) 664-1937.

Employees are expected to review the IRM and complete the "TO DO" activities Before their training sessions or before petitioning for past training credit by referring to applicable RCW's, WAC's, policy and procedure manuals, and by conferring with supervisors, colleagues, and assistant attorney general staff, as necessary. The purpose of this process is to:

- Economize on the time investigators spend formally in the classroom (on topics covered in the IRM), thereby minimizing the time spent away from their jobs;
- Provide the opportunity for more focused and interactive discussions between instructors and the training participants, based on the IRM and other in-class handouts or resources;
- Reinforce the experienced investigator's range of investigative knowledge, skill, and ability.

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Checklist

This checklist summarizes the various "TO DO" activities associated with several investigative training topics throughout this manual. Depending on the resources available to you (RCWs, WACs, policies, procedures, desk or operation manuals, etc., related to investigations in your organization), this manual should take approximately three to five hours to review and complete.

- BEFORE attending Core and Advanced Investigator Training session¹ : or,
- BEFORE submitting a Petition for Certification of Previous Investigator Training:
Have you reviewed and completed the "TO DO" items listed below?

[NOTE: If a "TO DO" item does not fit or apply due to your organization's scope of authority simply note 'N/A'.]

Page Number	Topic	Number of "TO DO's" for CORE Only	Check When Done
7	Scope of authority	2	_____
8	Ethics	2	_____
10	Rights of entry	1	_____
11	Subpoena & summons authority	1 or 2	_____
12	Administrative (Civil) warrants	1	_____
13	Tort and personal liability for errors	1	_____
26	Use of firearms and other weapons	1	_____
27	Referrals to other entities	1	_____
30	Public disclosure and confidentiality	1	_____

Page Number	Topic	Number of "TO DO's" for ADVANCED Only	Check When Done
19	Advanced Interviewing	1	_____

¹ The Department of Personnel and its trainers realize that due to a variety of circumstances, there may occasionally be 'last minute' substitutions of training participants. In this event, participants are asked to complete this checklist to the best of their ability, by coordinating with the person they are replacing or consulting with their supervisors, other colleagues or Assistant Attorney General Staff as needed.

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Scope of authority

Basic Definitions

RCW: An RCW (Revised Code of Washington) is a law passed by the legislature, the governor and/or Washington State citizens. RCWs are commonly referred to as 'statutes'. RCWs give an entity the authority to create, change or rescind WACs.

WAC: A WAC (Washington Administrative Code) is a rule created by an organization, based on RCW authority. The legislature, governor or citizens never vote on WACs, but they are created pursuant to the Administrative Procedures Act (Chapter 34.05 RCW).

How do RCWs, WACs or other documents, such as Collective Bargaining Agreements, affect government operations?

- An entity's jurisdiction is limited to that defined by the statutes. Organizations can operate only within the powers as defined by statute; they cannot make or pass laws.
- Government entities obtain the authority to make rules (WACs) from the statutes (RCWs). RCWs give state entities the power to make WACs.
- The rules and regulations (WACs) produced by state entities have the force of law, as long as the WACs are within the power delegated from the RCWs.
- The authority to enforce a state law is usually given through the RCWs. In some cases, a WAC does too; be sure to read your organization's RCWs and WACs!
- Collective Bargaining Agreements often spell out the procedures and set the framework for investigations related to alleged employee wrongdoing.

How and why is this important to investigators? Because as an investigator you must:

- Stay within your Scope of Authority as granted in RCWs, WACs or other binding documents. You must know and clearly understand what you can investigate.
- Never exceed the Scope of Authority. An enforcement action based on an investigation exceeding your Scope of Authority may be challenged in court.
- Be careful not to imply you're investigating RCWs or WACs beyond your Scope of Authority. Doing so could jeopardize an investigation and nullify resulting penalties.

"TO DO": Prior to a training session OR when petitioning for certification of previous training;

- Find "Scope of Authority" language in RCWs, WACs or other legal documents such as Collective Bargaining Agreements, related to your job. Identify and list by name/number the RCWs, WACs or other legal documents that authorize your investigative activities:
-
- Think about examples of investigative activities within and not within your Scope of Authority. Note the examples below. If you are unsure about your Scope of Authority, please consult with your supervisor, coworkers, or Assistant Attorney General.

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Ethics

Chapter 42.52 RCW – Ethics in Public Service applies to all state employees. It is extremely important that investigators always conduct their activities in an ethical and professional manner. For investigators, a working definition of Ethics in correlation to Chapter 42.52 RCW may be:

'The standards of conduct relating to the professional and moral duty that investigators have to other investigators and co-workers, the regulated community, and the citizens of the state.'

From **RCW 42.52.020 – Activities incompatible with public duties**: *'No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's or state employee's official duties.'*

The implications of this RCW are broad and very important to investigators. This statute has many citations related to investigative conduct, those that typically apply to investigators are:

- RCW 42.52.020: Activities incompatible with public duties
- RCW 42.52.030: Financial interests in transactions
- RCW 42.52.040: Assisting in transactions
- RCW 42.52.050: Confidential information – Improperly concealed records
- RCW 42.52.070: Special Privileges
- RCW 42.52.110: Compensation for official duties or nonperformance
- RCW 42.52.120: Compensation for outside activities
- RCW 42.52.130: Honoraria (acceptance of)
- RCW 42.52.140: Gifts
- RCW 42.52.150: Limitations on gifts (Section 4 Employees)
- RCW 42.52.160: Use of persons, money, or property for private gain
- RCW 42.52.180: Use of public resources for political campaigns

The text for these citations can be retrieved at <http://www.leg.wa.gov/lawsandagencyrules/>. Other citations under this RCW may apply exclusively to some state entities. Please review your policies, or consult with your supervisor/Assistant Attorney General (AAG) as needed. If curious about the meanings of the words from the above citations, see **RCW 42.52.010 Definitions**.

“TO DO”: Prior to a training session OR when petitioning for certification of previous training;

- Think of examples of ethical and unethical investigative conduct. Note them below:
- If you or others in your organization use an “Investigators Code of Ethics” or a similar document, please bring a copy to share with training participants.

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An Investigator's Code of Ethics

Article One

An Investigator shall, at all times, demonstrate a commitment to professionalism and diligence in the performance of his or her duties.

Article Two

An Investigator shall not engage in any illegal or unethical conduct, or in any activity, which would constitute a conflict of interest.

Article Three

An Investigator shall, at all times, exhibit the highest level of integrity in the performance of all professional assignments, and will accept only assignments for which there is reasonable expectations that the assignment will be completed with professional competence.

Article Four

An Investigator will comply with lawful orders of the courts, and will testify to matters truthfully and without bias or prejudice.

Article Five

An Investigator, in conducting investigations, will obtain evidence or other documentation to establish a reasonable basis for any opinion rendered. No opinion shall be expressed regarding the guilt or innocence of any person or party.

Article Six

An Investigator shall not reveal any confidential information obtained during a professional engagement without proper authorization.

Article Seven

An Investigator will reveal all material matters discovered during the course of an investigation, which, if omitted, could cause a distortion of the facts.

Article Eight

An Investigator shall continually strive to increase the competence and effectiveness of professional services performed under his or her directions.

Modified from the Association of Certified Fraud Examiners "Code of Ethics". For more information visit: <http://www.acfe.com/> or call 1-800-245-3321.

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Rights of entry

The authority to enter upon or gain access to private property to conduct an investigation is granted by an agency's scope of authority provided by statute. Most agencies also have policies and procedures addressing rights of entry. *The Fourth Amendment of the federal constitution and article I section 7 of the Washington Constitution* provides protection from unlawful entry to property.

For investigations involving allegations of alleged employee wrongdoing, please review existing policies and procedures regarding investigative access to employer furnished spaces or equipment such as desks, file cabinets, lockers, computers, etc. An employee's right to privacy in the workplace typically does not extend to these types of spaces or equipment, even though they may have been provided with keys, passwords, etc. that create the impression of privacy. If you have questions please consult with your supervisor or AAG.

It is important you are informed and knowledgeable about your organization's Right of Entry RCWs, policies and procedures. Generally, these documents address the following:

- Timing; Can investigations occur at 'reasonable times' or is 'any time' allowed? Reasonable times are usually defined as normal operating hours. Although some places under investigation may be open 24-hours a day, if managers or others knowledgeable about the nature of the investigation are not present you may have to return again when they are.
- Prior notification; Are 'unannounced' investigations 'OK', or is 'prior notification' required?
- Consent; Can entry occur only when permission is clearly granted?
- Emergencies; Some statutes waive the right of entry requirements when there is a 'true emergency'. Emergencies are usually defined in statute for specific entities. Examples are public health emergencies or environmental emergencies.

TIPS

- Locate and review your organization's right of entry RCWs, policies, and procedures.
- If you need to conduct "off-hours" investigations, or if you have questions about your organization's right of entry procedures, first consult with your supervisor and your AAG
- CLEARLY understand your official policy when encountering "No Trespassing" signs. If your agency doesn't have a policy, consult with your AAG.
- Think ahead of examples of when entry is being denied (see "TO DO" below).

Establish your role: For many people in the regulated community you may be the only one they come into contact with from your organization. To be effective, your position of authority and the reason you are there needs to be established from the start. Practice in advance your opening statement to identify yourself, where you work and what you do during the investigation. Your opening statement should not include threats or consequences if the person fails to consent to entry.

"TO DO": Prior to a training session OR when petitioning for certification of previous training; Think of examples when your rights of entry are clearly being denied, or when it would appear that your right of entry to a business, property or workspace that is under investigation is being denied. Please note them here:

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Subpoena and summons authority

What are subpoenas and summons, and how are they used?

Subpoenas are used to require the appearance of an individual or the production of records and documents. Subpoena authority usually comes from an agency's Scope of Authority RCWs.

A *Summons* is used to obtain jurisdiction over another party. A summons may be confused with a subpoena since in some circumstances they're both used to get the same results. A summons is usually used to start a proceeding.

In some cases, a *subpoena* is used because it makes the subject more comfortable answering questions or providing information because they were required to do so. This is referred to as a "friendly subpoena".

Generally, the request for issuing a subpoena must be "reasonable". In some cases agencies must request information using a 14-day deadline before issuing a subpoena. Always check with your supervisor or AAG for agency specific procedures. Some things to consider are:

- Is this request within the authority of the agency?
- Is the request specific? Does it clearly state what you need for the case?
- Is the information being sought relevant to the statutorily authorized purpose?

In April 2007, the Washington State Supreme Court limited the serving of an investigative administrative subpoena prior to obtaining judicial approval in *WA State v. Miles*. This limitation does not apply after a civil case is filed.

Subpoenas are usually not self-enforcing. Instead, the courts and their agents enforce them on the involved party. Chapter 34.05 RCW - Administrative Procedures Act (APA, sets forth procedures for judicial enforcement of subpoenas for most state agencies (specific exclusions are listed in RCW 34.05.030). A party that fails to respond to a court enforced subpoena is subject to civil contempt proceedings.

What should investigators do if they are served a subpoena?

Oftentimes during or after the course of an investigation, investigators or their office may be named in and required to respond to a subpoena. If this occurs, inform your supervisor and AAG *IMMEDIATELY* for the procedures you need to follow.

"TO DO": Prior to a training session OR when petitioning for certification of previous training;

- *Find out if your office has subpoena authority related to your duties.*
- *If so, note the RCW where this authority is located and familiarize yourself with your work unit's policies and procedures for subpoenas.*

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Administrative (Civil) warrants

What are administrative (civil) warrants, what are they used for and how are they obtained?

These warrants are issued by the courts to gain nonconsensual property access for investigations. Before an organization can apply to the courts for a warrant, they must first have statutory authority to enter upon private property and the scope and nature of this authority must be identified. The court must also have specific statutory authority to issue the warrant. To obtain an administrative warrant, entities must meet either one of two standards:

- A reasonable belief exists, based upon objective evidence that a violation has occurred.
- A demonstration that entry on the property is part of a neutral, administrative investigation program.

Warrant applications, prepared by the AAG and organization staff, generally must contain:

- A statement of the organization's authority to investigate and the court's authority to issue the warrant.
- Identification of the name and location of the property, and if known, the name(s) of the property owners or operators.
- Affidavits and other relevant documents supporting the asserted reasonable basis for entry; descriptions of any attempts to gain access with consent or why consent was denied.
- A specific description of the extent, nature, purpose, and timing of the investigation.

Each organization usually has specific statutory authority for administrative (civil) warrants and associated policies and procedures. Check with your supervisor and AAG for other requirements or exceptions.

Can an administrative (civil) warrant be issued without prior notice to the other party?

Yes. Applications for warrants can be *ex parte* proceedings. This means an entity may ask the court for a warrant without giving prior notice to the other party. The AAG, in conjunction with the organization, will determine case-by-case if prior notice will be given. A warrant application process is generally confidential and should only be divulged to those that 'need to know'.

Is there anything else to be aware of when starting the warrant application process?

Warrants are powerful investigative tools, but acquiring the court's assistance is time and labor-intensive. Explore other reasonable options if possible, and realize what you're imposing on the other party. Once you start the process be prepared to assist your AAG by gathering all relevant documents, preparing memos to summarize the facts of the case/the basis for action and being available to attend court hearings. You should also be prepared to provide detailed affidavits outlining information that is known or needs to be known.

"TO DO": Prior to a training OR when petitioning for certification of previous training:

- Find out if your organization has civil warrant authority related to your job. Note it below.

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Tort and personal liability for errors

What is a tort?

It's not a piece of cake; it's from Latin, meaning to twist, tortus, twisted, wrested aside. For purposes of investigator training in Washington State a tort means:

A violation of some public duty owing to the plaintiff resulting in harm or injury to the plaintiff. There are typically four elements that are demonstrated in tort claims: 1) A duty was owing; 2) The duty was breached; 3) The breach was caused (by the state); and, 4) Damages occurred.

Can I be personally liable if my 'on the job' activity causes harm or injury?

Yes. The good news is you can control your destiny. If you acted 'within the scope of...official duties' or, in good faith thought that you were acting within the scope of official duties when the harm occurred, the state will usually defend you and pay damages (see below).

Will the state automatically defend me and pay any damages?

It depends. The decision to represent you is made by the Attorney General's Office (AGO). If it's decided you were not acting 'within the scope of...official duties' when the harm occurred, the state will not defend you or pay your damages, and you may be liable instead (RCW 4.92.075).

What do harm and injury mean?

Harm and injury come in many forms and can occur when there is physical damage to a person or property or when promises are made, relied upon and then broken.

Think Before You Speak! What you say can be used against you. A friendly discussion in the field can become the basis for a future lawsuit. Speak clearly and don't make promises.

Should you follow-up on potential violations in a timely manner?

It is often best to address potential violations as soon as you encounter them, consistent with your organization's investigative policies and procedures. If you don't, those being regulated may think your organization does not fairly administer the RCWs and WACs. This may create a problem if your organization or another state or local entity decides to take an enforcement action later on to address the suspected violation. Be sure to document in writing your attempts to gain compliance in the field. This may involve field notes as well as telephone logs.

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(Tort and personal liability for errors continued)

Work Smart!

Working smart can help you avoid personal liability. Know your job description. Follow organizational policies and procedures. Stay within your authority and do so in a professional manner. If you have a question about an activity, first call your supervisor or AAG, then act.

What should I do if I get sued?

- Don't Panic!
- Inform your supervisor *IMMEDIATELY*.
- Follow organizational procedures. Send a written request to the AGO asking the state to represent you and pay your damages if you lose.
- Provide a detailed account of the facts that led to the lawsuit.
- An Executive Team in the Attorney General/Tort Claims Division will review it and make a decision.
- If the AGO grants your request, they will tell you what to do next.

Employee Liability: Answers to Common Questions

- *What does the term 'liable' mean from a legal perspective?*

The word has broad legal application. Generally, it means to be 'bound or obliged in law or equity; responsible; chargeable; answerable; compelled to make satisfaction, compensation, or restitution.' See Blacks Law Dictionary, 824, (5th Ed. 1979.)

- *How does legal liability arise?*

Legal liability can arise from a myriad of circumstances. For this reason, it is difficult to describe specifically those actions or activities that may or may not give rise to liability.

- *What does it mean to be acting in 'good faith'?*

RCW 4.92.070 does not define the term 'good faith'. Good faith has been defined as 'that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation'. Blacks Law Dictionary, 623, (5th Ed. 1979). The issue of when good faith has been demonstrated necessarily involves a factual finding on a case-by-case basis.

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(Tort and personal liability for errors continued)

- *What does it mean to act 'within the scope of...official duties'?*

Determining whether an employee was acting 'within the scope of official duties' when injury to a person or harm to property occurred, is done on a case-by-case basis. The Washington Supreme Court has suggested the following analysis be applied to answer the 'scope of official duties' question:

At the time of the incident:

- Was the employee engaged in the performance of the duties required of by contract of employment or by specific direction of the employer; and/or
- Was the employee engaged at the time of the incident in furtherance of the employer's interest?
Dickinson v. Edwards, 105 W. 2d 457 (1986).

In practice, this means that investigators should perform the duties they were hired to do according to organizational policies and procedures during authorized work hours. If they do, and an injury or an incident occurred that produced harm, there is a good chance they will be found to be acting within the scope of official duties.

- *If I'm named in a lawsuit in connection with my employment, can I choose to be represented by a private attorney?*

Yes. Of course, if the Attorney General determines you were not acting within the scope of duties when the injury or harm-producing incident occurred, you might not have a choice. Also, if you choose to be represented by private counsel, you are responsible to pay your attorney's fees.

"TO DO": Prior to a training session OR when petitioning for certification of previous training; Find out if there are specific policies and procedures addressing 'Tort and personal liability for errors' in your organization. If there are, note them for reference here:

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Interviews and interviewing techniques

Interviews are highly valuable but often underutilized means of gathering information during the investigative process. Oral and Written statements obtained from witnesses or people you are investigating are generally admissible as evidence. Investigators with good interviewing skills and personal attributes can elicit information and develop facts that may otherwise be missed.

What are 'good interviewing skills and personal attributes' for investigators?

- Attributes of honesty, integrity and objectivity.
- The ability to establish rapport, LISTEN, maintain self-control, and obtain information.

Is there a difference between an interview and an interrogation?

- **Interview:** Questioning an individual who is willing to disclose information because it is believed they possess information or knowledge of interest to an investigator;
- **Interrogation:** Questioning an individual believed to possess information or knowledge of interest to an investigator, but the individual is reluctant to make a full disclosure of the information. The goal of an interrogation is to obtain full disclosure.

The Basics: Planning, Conducting and Documenting interviews. While each interview will be different due to the nature of the case and the dynamics between the individuals involved, there are three basic steps:

- **Planning:** Consider the topics to be covered, the information needed, the individuals to be interviewed and best times/places for the interviews. Plan your questions in advance. Know the elements of the offense/potential violation. Plan to separate interview subjects if needed.
- **Conducting:** Introduce yourself; explain your reason for being there; note your interviewee's position and responsibilities; implement your interview plan, ask more detailed questions on specific points; summarize/verify to ensure accuracy. Thank them for their time when done.
- **Documenting:** Part of this step occurs with the previous step such as a note taking and if appropriate, obtaining written statements. After you finish your interview, make the time to review and expand your notes if needed and while statements or events are still fresh in your mind. You should always make a written record, such as a file memorandum, of each interview. Keep in mind your notes and writings may later be disclosed if they are not confidential by law or considered attorney work product. Also, even in the latter situation, there are instances in which some disclosure will be made.

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(Interviews continued)

What are some other important interviewing considerations?

Note Taking: Accurate notes are important, but not taking shouldn't be obtrusive or interfere with the interview process. If the pace is fast wait for pauses or 'backtrack' on important points. Slow the conversation down by delivering your questions more slowly, but avoid asking them directly to 'slow down'. Experts have found that when a strong rapport exists between two individuals, the conversational pace of one can influence the pace of the other.

TIP: A useful technique when staffing allows is for one person to ask the questions while another person takes more detailed notes. This approach also tends to avoid any potential loss in credibility due to differences in one's notes.

Tape Recorders: There are not legal barriers if tape recorders are used solely for recording your own observations before or after your interview or while you are on-site. However, using them during interviews is another matter! Interviews MAY be recorded IF done with the knowledge and consent of the interviewee. Consider whether you think that subject will speak more freely with or without a tape recorder running. Recording an interview without your subject's consent or knowledge may violate criminal statutes prohibiting such actions. Please review your own policies/procedures or consult with others regarding tape-recorded interviews before hand!

Written Statements: If the information given by an interviewee is significant, you may attempt to obtain a signed, written statement, if doing so is consistent with your entity's investigative policies and procedures. Consider the following if you plan to take a written statement:

- Determine the need for a statement. Will it provide useful information? Is the person qualified to give a statement because they have specific, personal knowledge of the issues?
- Consider all the facts and record those that are relevant regardless of source.
- Whether you prepare the statement for your subject, or they prepare it themselves, they are the ones that need to sign it.
- Provide a copy of the statement to the person who signed it if requested.

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(Interviews continued)

Analyzing non-verbal communication: For those attending training courses this topic will be covered in-depth. Think about your past experience and types of non-verbal cues that may have established rapport, as well as those that may have demonstrated honesty, truthfulness, the withholding of information, or lying. Non-verbal communication should also be considered in conjunction with verbal communication and cultural differences.

Questioning Techniques: Questions are the principal tools of interviewing. The quantity and quality of information obtained from interviewees will usually be proportional to the investigator's planning and skill in formulating and asking questions. Some fundamental characteristics of good questions are to:

- Make them short, simple, easily understood and confined to one topic.
- Use neutral wording.
- Frame questions to elicit narrative answers
- Avoid questions that can be simply answered by 'yes' or 'no'.

Types of Questions:

The Five 'W's' and one 'H', when used in most investigations will usually provide you with valuable information:

Who was involved?	What happened?	When did it happen?
Where did it happen?	Why did it happen?	How did it happen?

Precise Questions call for specific or an exact answer. They limit the requested answer to specific areas of interest, keep the discussion focused, and will usually extract information with little effort. Examples of questions which are increasingly more precise:

- What did you do at work yesterday?
- What did you do at work yesterday afternoon?
- What did you do yesterday when you first noticed something was wrong?

Leading Questions tend to lead or suggest a desired answer or assume something that may not be established by fact. Since they can influence answers, they should be avoided during interviews, unless you are skilled in using them to your investigation's advantage.

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(Interviews continued)

Questions to Avoid are double or triple negative questions that suggest an opposite answer to the desired one, such as "Didn't you see that neither?"

Run-on or hard to understand questions that address multiple activities should also be avoided. An example: "When did you arrive, what happened then, why did they do it?"

Other questioning tips:

- Sequence questions by grouping and getting answers to one issue or topic at a time.
- 'Reach backwards', by starting with known events for facts and work towards areas of undisclosed information.
- Interviewees don't always give accurate information when first asked about time, distance, numbers or quantities. Ask questions that guide (but do not lead) them to another reference point. For example, guide them to use common, easily understood reference points or items to describe distances, numbers, sizes and volumes.
- *Silence is Golden!* If a question is not answered immediately, do not rephrase the question before they attempt to answer. Allow time for a response.

Advance Interviewing and Interrogations

Advanced interviewing techniques such as past memory recall and interrogation skills will be covered in depth during classroom training sessions.

"TO DO": Prior to the ADVANCED training session;

- *Think about specific interview techniques, scenarios or issues you want to focus on. Let instructors know of your needs in advance of them covering this topic.*
- *Be prepared to put your current or newly acquired skills into practice by role-playing.*

NOTES:

Investigator's Resource Manual

Respecting Constitutional rights; Respecting the rights of people being interviewed; and, The Laws of Arrest

[The above topics are related to several preceding topics (Rights of entry, Subpoenas and summons authority, Civil warrants and Tort and personal liability for errors). Please review these topics if you have not already done so.]

What are the constitutional rights of people involved in civil investigations?

- The Fourth Amendment to the Constitution protects persons from unauthorized searches. It specifically states it is: "The right of the people to be secure in their person, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."
- The Fifth Amendment to the Constitution protects persons from self-incrimination. In simpler terms, it guarantees that citizens cannot be compelled to be witnesses against themselves and their statements cannot be used against them, unless they were advised beforehand of this right and they chose to waive it.
- The Fourteenth Amendment to the Constitution provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Miranda Warnings (Note: The vast majority of civil investigators do not have the authority to hold and question a suspect in custody, but this information is provided here for completeness.)

To ensure that every citizen has the opportunity to exercise their fundamental rights as noted above, the Supreme Court ruled in the landmark case of *Miranda v. Arizona* [348 U.S. 436 (1966)] that police must give the following warning before questioning a suspect who is in custody:

The suspect has the right to remain silent; Any statement made by the suspect can be used against them at trial; The suspect has a right to retain the assistance of an attorney; and, An attorney will be appointed to represent the suspect if the suspect cannot afford to retain one.

Once a suspect asserts the right to remain silent, all questioning must cease until an attorney is provided. If a suspect decided to make a statement after a Miranda warning, the government must show the statement was the result of a voluntary, knowing waiver of the suspect's rights. Keep in mind the differences between 'making a statement' and the 'production of documents', as noted previously in *Subpoena and summons authority*.

Miranda warnings are required only if a suspect is (1) being questioned, (2) while held in custody, (3) by public authorities. Certain exceptions to the Miranda warning requirement apply such as when immediate questioning is necessary to ensure the public's safety. Miranda warnings are generally not required when a private party is questioning a person.

NOTES:

Investigator's Resource Manual

(Respecting constitutional rights, etc., continued)

- The Garrity Rule. (Only for investigations of alleged or suspected employee misconduct conducted by the employer.) The Fifth Amendment rights against self-incrimination were faced by the Supreme Court in a 1966 landmark case (*Garrity v. New Jersey*). In a nutshell, employees were ordered to respond to an investigator's questions and they were informed that refusal to respond would result in discharge from work². Their answers were later used in criminal proceedings, which resulted in convictions. The Supreme Court ruled the employees' statement violated their Fifth Amendment rights. Since then, many other court decisions and interpretations have also addressed the issue.

Garrity becomes important when the conduct being investigated may also be charged as criminal conduct. The employer may act on an employee's statement, but a prosecutor later may not be able to use the statement. As long as employers do not 'coerce' statements there is not a problem and the investigator allows an employee to decline an answer without fear of retribution, the *Garrity* exclusion is not involved. This is a complex area of law, but it should not scare internal investigators away from doing their job. Consult with your AAG as needed. *If attending a training session, make sure the trainer is aware of your interest in this area.*

Laws of Arrest: Clearly, only state employees who are trained to conduct arrests can do so during investigations if and when they are acting within their scope of authority. However, it is very important that civil investigators, despite their best efforts, do not unknowingly or unintentionally create a real or apparent custodial situation. This is known as a '*False Arrest*'.

How does one avoid the appearance of a 'False Arrest'?

These concepts and techniques will be discussed in training; some points to consider now are:

- Make sure interviewees understand the type and nature of the investigation being conducted.
- The interview's physical set-up is important. Doors should not be locked nor should exits appear to be blocked by you or other physical objects.
- Avoid giving them the impression they are under any type of custody.
- As you establish rapport, inform them you sincerely want to hear "their side of the story", while events are still fresh in their mind and before others get involved, *BUT*;
- Also inform them "they are free to leave or end the interview anytime". This is especially important if you are conducting an interview in a closed door setting.
- Know/understand your organization's policy and procedures when asked to leave private property. As a general rule and as good advice, if asked to leave property, quietly leave.

NOTES:

² From: The Rights of Law Enforcement Officers. PP 116-120. Aitchison, Will. 1989. Labor Relations Information System, Portland, OR.

Investigator's Resource Manual

Evidence: Principles of, Gathering, Documenting, Developing, and Maintaining its integrity and Chain of custody.

For those attending Core or Advanced Investigator training, the above aspects of evidence in the investigative process will be discussed at length. However, familiarizing yourself now with the information in this section of the *Investigator's Resource Manual* will help you get the most out of your training activity.

What is the law of evidence? It is a system of rules of when, how and whether some piece of information can be used in court. While not a requirement, the system is usually followed in civil administrative proceedings as well.

What is the reason for rules of evidence? To maintain consistency, reliability, and fairness.

What are some commonly used definitions or terms related to 'evidence'?

Evidence: The means by which any contested factual matter may be established or disproved.

Probative: That which furnishes, establishes or contributes toward proof. (Evidence has "probative value" if it tends to prove an issue.)

Admissibility: That which is pertinent and proper to be considered in reaching a decision. Admissibility may be an issue if the person giving you evidence is not authorized to do so.

Classification: Evidence is broadly classified as direct or circumstantial.

- **Direct Evidence:** Tends to establish the precise fact in issue without the aid of inference or presumption. Direct evidence usually involves an eyewitness. It may also be films, photographs, records or signed statements of a violation being committed.

Examples (in training):

- **Circumstantial Evidence:** Proves the fact in issue indirectly through proving another fact from which a reasonable inference or presumption may arise as to the fact in issue. Circumstantial evidence may also be a series of facts from which another fact can be reasonably inferred.

Examples (in training):

NOTES:

Investigator's Resource Manual

(Evidence continued)

Forms of Evidence: Evidence can consist of several forms. Categories and brief definitions are:

Real Evidence: Tangible objects that can be seen or felt, allowing the trier of fact to reach conclusions based on their perceptions, rather than relying on the interpretation of a witness.

- **Documentary:** Writing that “speaks for itself” as to its contents. For this type of evidence the “*Best evidence rule*” means the most original document is generally required.
- **Physical:** Something that is a piece or a part of an actual event.
- **Scientific:** Lab tests of bodily specimens, non-bodily items, solid materials, document testing, radar, etc. Scientific evidence also requires authentication by an expert.

Examples (in training):

Testimonial Evidence: Supplied through witnesses rather than by the production of objects.

Lay (non-expert): Generally, lay witnesses are allowed to testify only to facts. Opinions may be allowed in some cases.

Examples (in training):

Expert: Witness used when the average person would not be able to make a reasoned judgment based on the facts or data presented. Experts are used in administrative cases when complex technical or professional issues are involved. Their competence as an expert witness is never presumed; their qualifications and expertise must be established.

Demonstrative Evidence: Representations or illustrations intended to help prove a material fact. Usually an aid to testimonial evidence, giving it more weight or making it better understood.

Examples (in training):

Judicial Notice: Commonly known or easily ascertainable facts recognized as being true without requiring formal proof. The judge or jury does not need proof that Wednesday is a day of the week.

Examples (in training):

NOTES:

Investigator's Resource Manual

(Evidence Continued)

General Rule of Evidence: Evidence is admissible if it is 'material, relevant and competent'.

Material: The evidence has something substantive to do with an issue in the case.

Examples (in training):

Relevant: The evidence can fairly establish or infer an important fact in the case.

Concept and Examples (in training):

Competent: The requirement that evidence does not violate an exclusionary rule. Exclusion means evidence may be excluded even though it is otherwise probative and helpful in determining the ultimate issues of the controversy.

Concept and Example (in training):

'Hearsay Rule': This is probably the most important exclusionary rule of evidence, since this type of evidence is generally inadmissible in court proceedings. In Washington, hearsay is admissible in administrative proceedings. *Hearsay* means an out-of-court statement or act offered in evidence to prove what was said or done is true.

Hearsay is suspect because:

- The adverse party is denied the opportunity to cross-examine the person who actually made the statement.
- The person who made the statement is not under oath at the time of the statement.

There are exceptions to hearsay! (in class)

NOTES:

Investigator's Resource Manual

(Evidence Continued)

Evidence in Administrative Cases: The formal 'rules of evidence' are relaxed in most jurisdictions for administrative proceedings. Evidence that may be inadmissible in a court proceeding may be admitted and considered in an administrative proceeding to reach a decision. In administrative proceedings, the rules of evidence are guided by RCW 34.05.452. Also, Chapter 10-08 WAC contains Model Rules of Procedure in support of Chapter 34.05 RCW.

What is the 'Standard of Proof'? How sufficient must the evidence be?

In the majority of civil administrative cases the 'Preponderance of Evidence' standard is used. This means the party with the most or best evidence prevails, even if it's only slightly more or better than the other side's evidence. Some state agencies, such as Revenue and Employment Security have higher standards, meaning the evidence must also be 'clear and convincing'.

After all 'legal considerations' are taken into account, what should the practical investigator focus on when gathering, documenting & developing evidence and maintaining its integrity?

The initial focus should not be whether the evidence would be useful at trial. Instead, investigators should focus first on gathering all the possible relevant evidence and ensuring it is admissible by following good documentation, maintenance and chain-of-custody techniques.

Some useful definitions and concepts are:

Authenticate evidence by establishing that something is what you claim it to be.

Follow the '*Best or Original Evidence Rule*', meaning the most original document is best.

Maintain evidence by preserving its identity, marking it where possible without affecting its evidentiary value, tagging it when marking is not practical or sealing and labeling it when marking or tagging is not practical. It is highly advisable to use a uniform labeling system.

Be sure to document information identifying the person(s) who obtained the evidence and when, where and how the evidence was obtained. For documentary evidence ALWAYS make a working copy for your own use. Never write on originals.

FINALLY, consistently follow your organization's established policies and procedures for gathering, documenting, developing, maintaining and securing evidence. A locked file cabinet or room that only you (and other so authorized) have the key to is generally sufficient for most chain-of-custody needs. For investigators dealing with perishable types of evidence, always be prepared to preserve, transport and secure the evidence as soon as practical.

NOTES:

Investigator's Resource Manual

Use of firearms and other weapons

The purpose of including this topic in this training program is to ensure state employees have a clear understanding of the authorities, policies and procedures that must exist if they have firearms or other weapons in their possession while conducting an investigation during their authorized work hours.

Specific training on the use of firearms and other weapons (competency and proficiency) for state employees is strictly the responsibility of those state entities whose employees have clear statutory and policy authority to carry and use firearms or other weapons during an investigation.

State entities whose employees do not have the statutory authority to have firearms or other weapons in their possession while conducting an investigation, should clearly address this matter through specifically developed, sanctioned and practiced policies and or procedures.

Specific potential or real examples of the negative consequence that may occur if investigators carry firearms or other weapons when not authorized to do so during the conduct of an investigation will be discussed in training sessions.

For specific statutory language about the possession of firearms, please see Chapter 9.41 RCW, Firearms and Dangerous Weapons, and specifically, RCW 9.41.050, Carrying firearms and RCW 9.41.060, Exceptions to restrictions on carrying firearms.

"TO DO": Prior to a training session OR when petitioning for certification of pervious training;

- *Find out what your organization's policies/procedures are with respect to your possession of firearms or other weapons while conducting investigations.*
- *Note the policy's and/or procedure's name, number and its main point(s) below:*

NOTES:

Investigator's Resource Manual

Referrals to other entities

'No investigator is an island'. This means there's often a chance there may be other civil or criminal violations associated with your investigation, but not under your investigative scope of authority. These violations might affect other parts of your organization, other state agencies or local entities. If you see something suspicious, but it's not within your job scope or jurisdiction to investigate, inform your supervisor and AAG and/or follow your organization's established referral policies as soon as practical.

Your referral goal is to effectively and efficiently transfer your observations and suspicions of wrongdoing to organization's you know or think have authorized investigative and enforcement jurisdiction. Whether this is done in person or by phone, e-mail, or letter depends on your organization's referral policies and procedures.

A written record is the most effective way to hand-off a referral. Usually, this occurs on the receiving end through established complaint intake processes, and you may only need to make a phone call.

[For more information on 'Referrals' please see the "TO DO" list at the end of this section.]

What Constitutes a Criminal Violation?

Generally, criminal behavior is defined as a violation conducted knowingly, intentionally and/or willfully. Additionally, any fraudulent reporting, testimony, or record keeping may be also considered a criminal action. Most statutes enforced under civil administrative proceedings by state entities also contain provisions for criminal actions. For example, any person found guilty of willfully violating the provisions of Washington's water pollution control and oil spill statutes shall be deemed guilty of a crime (RCW 90.48.140). If there are both civil and criminal sanctions related to cases you are investigating, be sure to understand and follow your entity's policies and procedures BEFORE referring alleged or potential criminal violations to another jurisdiction.

Criminal cases are brought by the government against individuals or corporations accused of committing a crime. The government makes the charge because a crime is considered an act against all of society. The prosecuting attorney prosecutes the charge against the accused person (defendant) on behalf of the government (plaintiff). In criminal cases, the prosecution must prove to the judge or jury that the defendant is guilty beyond a reasonable doubt.

TIP: Know in advance to whom you should refer an alleged or suspected civil or criminal matter when the matter is outside of your job or your organization's authority.

NOTES:

Investigator's Resource Manual

(Referrals continued)

Are there some basic guidelines for recognizing potential criminal violations?

Evidence of criminal wrongdoing is seldom blatant, and is usually quite subtle. Therefore, investigators should be alert to the types of findings listed below and view these as "red flags" which may indicate criminal action:

- Conflicting data: Two sets of books/inconsistent monitoring reports, etc.
- Conflicting stories: Investigators led to believe one thing, yet find something quite different in records or observations.
- Deliberate actions: Witness said they were told to do something illegal.
- Claims of ignorance about requirements: Copies displaying knowledge are discovered in records, or others make statements during interviews of 'knowledge'.

The above list is by no means all-inclusive. The point is any conduct that may show an intentional and willful violation of the law could be a criminal action.

How should I handle possible criminal violations?

A common mistake made by civil investigators is to back off from an investigation when possible criminal evidence is discovered. When probable criminal activity is discovered, you MAY continue your civil investigation within your scope of authority, IF doing so is consistent with your organization's policies and procedures.

Early communication with the appropriate criminal investigative entity is the key to any criminal case (local police, county sheriff, state patrol, or federal agents). Investigators should follow the organization's established criminal referral process when possible criminal activity is suspected. Phone conversations are usually not sufficient for formal case referrals.

What kind of information do other entities normally need?

- The identification and address of the person(s) suspected of criminal wrongdoing.
- The name/address of any informants/witnesses and telephone numbers if available.
- A basic description of what crime may have been committed or what specific acts were committed that the civil investigator or other person believes to be criminal.
- Evidence to indicate that there are potential crimes.

NOTES:

Investigator's Resource Manual

(Referrals continued)

What are the conditions of criminal enforcement?

Standard of Proof: To prove a criminal violation, prosecutors must prove the case “beyond a reasonable doubt.” If a reasonable doubt exists in the trier’s mind about the defendant’s guilt after the conclusion of a criminal case, the defendant is acquitted. This burden is much greater than the preponderance of evidence (50% +) standard used in civil cases.

Evidence Allowed: The rules surrounding the types of evidence allowed in a criminal case are much more stringent than the rules for a civil case because of possible violations to a defendant’s constitutional rights.

Concurrent Civil and Criminal Actions: After checking with and following your organization’s referral policies and procedures, it may be possible to pursue both external civil and criminal investigations concurrently. This may not necessarily preclude other regulatory or administrative actions from taking place for the same subject, such as new investigations, responses to new complaints and other routine administrative matters.

Once a case has been referred for criminal investigation, it is very important that authorized concurrent civil investigative activities are communicated clearly and as appropriate with criminal investigative entities.

“TO DO”: Prior to a training session OR when petitioning for certification of previous training consider the following questions;

- *Do you know what our organization’s and work unit’s referral processes are? Are they easy to follow and can you readily retrieve them?*
- *What types of other program responsibilities within your office or in other state offices and local jurisdictions do your investigations routinely or occasionally “bump into or overlap”? Check with them on their compliant acceptance and referral procedures? Keep them handy!*
- *Most organizations typically have some type of confidentiality clause with regard to investigative referrals. Does this exist where you work? Do you know the clause’s content?*

NOTES:

Investigator's Resource Manual

Public disclosure and confidentiality

As an investigator, it is important to have a working knowledge and understanding of Public Disclosure statutes, specifically RCW 42.56.250 – Public Records.

The Washington Legislature has decided, and the courts agree, that government works best when the public knows or has the means to know what's going on. Most anything is considered a 'writing'. The government keeps 'writings' so it can do its job, but they must be available for the public to view. However, there are exceptions. The Legislature has recognized some 'writings' should be exempt from public view. Many general and specific exemptions are listed in RCW 42.56.310, as well as other cites in Chapter 42.56 RCW. When asked, the courts have applied the exemptions narrowly. This means courts will not protect a 'writing' from disclosure unless it's absolutely clear an exemption applies.

What is a 'Writing'?

A 'writing' can take a variety of forms. Anything that communicates an idea or position, whether by words, a picture, or letter, a recording, or symbol is considered a 'writing'. A 'writing' becomes a 'public record' once the government keeps it. For example, your investigative field notes or other writings about an investigation will usually be considered to be public records. Whether or not they can be disclosed to the public is a question for your Assistant Attorney General(s). Public records that are not exempt can be viewed by anyone unless an exemption applies (see "*Why should I care about the Public Disclosure Act?*" on the next page).

Reasons don't matter!

If a public record is available to one person, it's available to everyone. The content of the document and not the reason for the request is what matters in a public disclosure decision.

Response time is critical!

An organization has FIVE DAYS from the day it receives a public disclosure request to respond (See RCW 42.56.320). Response means that the organization must provide the document, deny the request, or acknowledge that the request has been received and provide a reasonable time period for responding. Failure to respond in a timely manner can result in fines of \$100 to \$500 per day. The Public Disclosure Act allows courts to award this amount for every day a person is wrongfully denied access to a public record.

NOTES:

Investigator's Resource Manual

(Public Disclosure continued)

Confidential Complaints – Who Decides?

People who call state offices to file complaints or report violations can, under most circumstances, have their name kept confidential. It's not automatic; the person must request confidentiality and the protection of confidentiality must be covered in organization specific RCWs. If confidentiality cannot be maintained due to statute, the state is generally obligated to release the name if asked. Always check your organization's specific policies and procedures. Notify your Public Disclosure Coordinator when people request confidentiality.

Why should I care about The Public Disclosure Act?

You should care for two reasons:

First, you may receive a public disclosure request at any time. Remember that the request does not need to be in writing. If you don't process a request immediately, your organization may not be able to respond with 5 DAYS. Failure to act could subject your organization to a court imposed fine. If someone else is responsible to open and act upon your mail while you are out of the office, make sure they can recognize requests for disclosure of public records, so your organization can respond on time. Otherwise, it *may* be best to leave your mail unopened until you return.

Second, what you say in your 'writings' will likely be available to the public *most* of the time. To avoid embarrassing yourself and your organization, keep your 'writings' factual. As a general rule *'Don't put anything in your 'writings' you wouldn't want the public to read'*. Some 'writings', or portions thereof, may be exempt because of Attorney-Client privilege or due to their specific content. Exemption decisions are usually made on a case-by-case basis. However, don't assume that a specific 'writing' will be exempt. The rules of disclosure are technical and complicated. Your Public Disclosure Officer and the AG's office will decide which 'writings' are exempt pursuant to RCW 42.56.210-480 and RCW 42.56.600.

Can I ever 'destroy' a public record once it is created?

Once a public record is created it can only be destroyed consistent with your office's statutes, rules or policies and procedures about records retention. The improper destruction of a public record could seriously impair the credibility of any reports and decisions springing from your investigative work. For additional information please see Chapter 40.14 RCW, Preservation and Retention of Public Records. As a final note, ALWAYS consult with your Public Disclosure Officer and Assistant Attorney General for current policy and procedure.

NOTES:

Investigator's Resource Manual

(Public Disclosure continued)

What do I do if I receive a Public Disclosure Request?

IMMEDIATELY send it to your Public Disclosure Coordinator. This means making sure the coordinator has a copy of the request the day it's received. If your coordinator is out of the office for a few days, IMMEDIATELY find out who else is responsible in their absence. The Public Disclosure Officer coordinates difficult requests with the AG's office. Original requests for assistance are usually not sufficient. If oral requests are sufficient in your organization, be sure to document your request in writing for your own files.

Are the files and documents being requested related to an ongoing investigation?

If "yes", they're usually exempt from disclosure until the investigation is completed.

Confidentiality: Investigators must treat information concerning suspected wrongdoing as confidential to the extent the law, and as organization policy/procedures, dictate. Premature disclosure of the fact that an investigation is underway may jeopardize a case and/or slander a business or individual. Work with your managers and Public Disclosure Officers as needed. If a criminal investigation is underway, to protect the reputations of those being investigated from unjust accusations and to avoid interference with a criminal investigation in any way, information regarding a criminal case should be disseminated only to pre-determined people. Such people may include chief criminal investigators & county prosecutors, the Courts, the Attorney General's Office, the Washington State Patrol, and local sheriff or police.

Other Resources: Open Records & Open Meeting Deskbook see: <http://www.atg.wa.gov/PublicRecords/default.aspx>

"TO DO": Prior to training/when petitioning for certification of previous training:

- *Know your Public Disclosure Officer(s) and where policies/procedures are located regarding this topic. Note their name(s) and the locations of policies/procedures here:*

NOTES:

IRMFv8 August 2009

(This is the last page of this edition of the Investigator's Resource Manual)